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COURT OF APPEAL OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT

COORDINATED PROCEEDINGS SPECIAL TITLE
(RULE 3.550)

QSA COORDINATED CIVIL CASES

Appeal From Judgment Entered February 11, 2010
Sacramento Superior Court Case No. JCCP 4353
Coordination Trial Judge The Honorable Roland L. Candee, Department 41

BRIEF OF COUNTY OF IMPERIAL AND IMPERIAL COUNTY AIR POLLUTION CONTROL DISTRICT IN RESPONSE TO AMICI CURIAE AUDUBON CALIFORNIA, DEFENDERS OF WILDLIFE, PACIFIC INSTITUTE, PLANNING AND CONSERVATION LEAGUE AND ENVIRONMENT NOW

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INTRODUCTION

Respondents and cross-appellants County of Imperial and Imperial County Air Pollution Control District ("county agencies") endorse the two amici briefs filed by coalitions of environmental organizations ("environmental amici").[1] In these briefs several of California's most respected environmental organizations, drawing from extensive Quantification Settlement Agreement ("QSA") and Salton Sea experience, debunk the appellant water agencies'[2] and State's attempts to greenwash the QSA while evading constitutional limits and compliance with environmental laws.

The environmental amici chronicle the failures of the State and water agencies to protect the Salton Sea and to honor even the limited mitigation measures in the QSA, much less the broader mitigation that the California Environmental Quality Act ("CEQA") may require. Audubon California, Defenders of Wildlife, and Pacific Institute conclude: "[T]he conditions that will occur if the current Quantification Settlement Agreement 'QSA' is left in place *will destroy the ecological health of the*

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[1] These coalitions, respectively, are (1) Audubon California, Defenders of Wildlife, and Pacific Institute (collectively, "Audubon"); and (2) Planning and Conservation League and Environment Now (collectively, "PCL").

Aside from their argument, the appearance of these prominent environmental advocates debunks the water agencies' suggestions that without the QSA the Salton Sea will only become worse off. If a "no QSA alternative" produces its own threat to ecological stability, forceful public and private advocates can be expected to invoke statutory and common law remedies against those whose actions or inactions are responsible.

[2] The principal water agencies include Imperial Irrigation District ("IID"), San Diego County Water Authority ("SDCWA"), Coachella Valley Water District ("CVWD"), and Metropolitan Water District of Southern California ("MWD").

Salton Sea and threaten the public health of the surrounding region due to exposure of dry or drying lakebed and resultant wind-generated dust emissions." (Audubon Brief 1 (emphasis added).)

Similarly, the Planning and Conservation League and Environment Now conclude: "On the facts, it cannot be reasonably disputed that the Salton Sea's *water levels and avian habitats have already suffered significant, adverse impacts* since the challenged QSA approvals in 2003. Further it is undisputed that that *previously promised 'on the ground' plans to arrest or alleviate the QSA's impacts going forward have yet to be finally approved, let alone commenced.*" (PCL Brief 10 (emphasis added).)

These briefs eloquently address key issues. First, they underscore the urgent need for this Court to provide the overdue adjudication of CEQA merits and not to allow the QSA to proceed without adequate, timely, and funded mitigation. The Salton Sea has experienced major declines in surface elevation, exposing thousands of acres of former lakebed, since the QSA's 2003 implementation. (Audubon Brief 5.) That crisis will turn to catastrophe after 2017, the last year in which IID has committed to provide mitigation water. (*Id.*) Due to delays in mitigation and the State's seven-plus years of near-complete inaction, the QSA as approved cannot prevent these harms from occurring. Avoiding dire consequences for public health, protected species, and habitat will require this Court's relief.[3]

[3] The amici briefs provide a "reality check" against the water agencies' denials of urgency to resolving the CEQA merits. The amici commendably follow the tradition of the "Brandeis brief," drawing upon relevant empirical evidence. Amici curiae may present such material without requiring formal inclusion in the administrative record. See, e.g., *Rivera v. Division of Industrial Welfare* (1968) 265 Cal.App.2d 576, 590 n. 20 ("[t]he 'Brandeis brief', which brings social statistics into the courtroom,

Second, the Audubon brief vitiates the water agencies' attempts, through creative accounting and wishful thinking, to understate the State's exposure for its "unconditional" QSA mitigation promise. The Audubon brief confirms the State's own recognition of projected QSA mitigation costs far in excess of the $133 million referenced in the Quantification Settlement Agreement Joint Powers Authority Creation and Funding Agreement ("QSA-JPA") and QSA legislation, and importantly that restoration of the Salton Sea was part of the promised QSA package.

Third, the PCL brief undermines the water agencies' cynical attempt to assert CEQA compliance on appeal in this Court, while avoiding any defense of the CEQA merits pending in the cross-appeal. This tactic rests upon profoundly mistaken assumptions. The premise that a separate source of "original jurisdiction" is needed to address the CEQA merits contravenes the California Supreme Court's teaching on de novo appellate review in a CEQA action.

Finally, the environmental amici demonstrate the need for this Court's prompt and decisive remedy. Under the most optimistic projection, which the State's inaction hardly justifies, a functional mitigation project could not be implemented until *early 2021* (assuming the State and water agencies cooperate), more than three years after IID ceases providing mitigation water to the Salton Sea. (Audubon Brief 14.) In short, the QSA as approved and implemented cannot avert disaster. Only this Court's merits adjudication and prompt relief can prevent that outcome.

"has become a commonplace"); see also RUTTER GROUP, CAL. PRAC. GUIDE CIV. APP. & WRITS (2011), Ch. 9-D: 9:210.1.

ARGUMENT

I. THE ENVIRONMENTAL AMICI DEMONSTRATE THE URGENT NEED FOR THIS COURT TO HALT THE QSA'S ADVERSITY AT THE SALTON SEA.

A. Implementation of the QSA since 2003 has already exposed the bankruptcy of the promised mitigation, bringing the Salton Sea to the brink of catastrophe.

Seeking to justify further delay after almost eight years of avoidance of the QSA's CEQA merits, the water agencies have relied heavily on the QSA's promised mitigation, notably IID's time-limited and insufficient delivery of mitigation water to the Salton Sea.[4] Although no court has yet tested the adequacy of QSA mitigation, the water agencies have repeatedly relied on it to rebut QSA-related dangers to the environment and public health (see, e.g., Air District RB/XAOB[5] 73-79, 87-88), and to dismiss QSA-related damage to the Salton Sea as "unsupported apocalyptic predictions" (SDCWA/CVWD/MWD ARB 147).

In contrast to this rhetoric, the Audubon brief examines the post-2003 record of QSA mitigation, citing publicly available studies, as well as reports of state and local water agencies. That discussion, also endorsed in the PCL brief (10-12), addresses these critical circumstances:

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[4] Water agencies' supersedeas petition 19 (claiming "significant and ongoing environmental mitigation and water conservation programs"), 23 (claiming "IID is currently implementing major environmental mitigation projects paid for" by the QSA-JPA), 23 ("IID delivers mitigation water to the Salton Sea *until 2017* to protect the Salton Sea for *inflow reductions caused by IID QSA conserved water transfers*") (emphasis added).

[5] AOB means appellant opening brief. RB/XAOB means respondent brief/cross-appellant opening brief. ARB means appellant reply brief. XARB means cross-appellant reply brief.

1. Recurrent Dust Storms.

Environmental amici are rightfully alarmed that recurrent dust storms at Owens Lake—which earlier this year resulted in stage 2 health advisories, encouraging all people to stay indoors—are "indicative of the frequency and severity of the dust storms that could severely degrade the air quality within the Imperial and Coachella Valleys immediately adjacent to the Salton Sea." (Audubon Brief 3.)[6]

A monitoring network[7] that has been established around the Salton Sea to measure PM_{10} concentrations from the exposed shoreline caused by

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[6] The Great Basin Unified Air Pollution Control District ("GBAPCD") issues health advisory notices based on the following trigger levels:

- A stage 1 air pollution health advisory will be issued when hourly particulate pollution levels exceed 400 microgram per cubic meter ("µg/m3"). A stage 1 health advisory will recommend that children, the elderly, and people with heart or lung problems refrain from strenuous outdoor activities in the impacted area.
- A stage 2 air pollution health advisory will be issued when hourly particulate pollution levels exceed 800 µg/m3. A stage 2 health advisory will recommend that everyone refrain from strenuous outdoor activities in the impacted area.

In February, 2011, the GBAPCD issued three health advisories. On February 14, 2011, a stage 1 advisory was issued for Keeler when PM_{10} concentrations reached 699 $\mu g/m^3$ during one hour. On February 15, 2011 a stage 2 advisory was issued for Lone Pine and Independence when PM_{10} concentrations reached 905 $\mu g/m^3$ during one hour. On February 16, 2011 a stage 1 advisory was issued for Lone Pine when PM_{10} concentrations reached 405 $\mu g/m^3$ during one hour. The declaration of Ted Schade (RJN2:2:3:137-363) amply explains the significant air quality problem at Owens Lake raised by environmental amici and why the QSA has and will continue to cause similar conditions and problems will occur at the Salton Sea.

[7] Information about the monitoring network is available at http://www.co.imperial.ca.us/AirPollution/Forms%20&%20Documents/M

the QSA confirms amici's and the county agencies' worst fears that the serious health hazards produced at the exposed Owens Lake now prevail at the Salton Sea. PM_{10} is one of the pollutants EPA identified that endanger the public health and welfare, and for which the EPA formulated a National Ambient Air Quality Standard ("NAAQS") that specifies the maximum permissible concentrations of those pollutants in the ambient air. (42 U.S.C. §§ 7408-7409; 42 U.S.C. § 7409(b)(1).)

PM_{10} is a particular public health concern because these pollutants affect the respiratory system (including worsening asthma) and can cause lung tissue damage and premature death. (*Vigil v. Leavitt* (9th Cir. 2004) 381 F.3d 826, 830.) EPA established NAAQS for PM_{10} at 150 µg/m3. (40 C.F.R. Part 50.6.) This is the same monitoring network that was required to be established within six months of the execution of the QSA, approval of the water transfers, and issuance of the notice of determination under CEQA, that is April 2004. (Brad Poiriez Declaration, RJN2:2:8:492-495.[8]) This monitoring network was installed for the sole purpose of assessing and ensuring adequate mitigation of the air quality impacts at the Salton Sea caused by the QSA. This monitoring network was required by the Environmental Impact Report/Environmental Impact Statement ("EIR/EIS"), Program EIR ("PEIR"), Environmental Cost Sharing, Funding, and Habitat Conservation Plan Development Agreement ("ECSA"), QSA-JPA, and State Water Resources Control Board Water Order WRO 2002-0013 (condition 8), and is not certified for NAAQS

ONITORING/FINAL%20QA%20QC%20PLAN%20SSAQMN%20JAN%2027%202010.pdf.)

[8] "RJN1" refers to the County Agencies' motion requesting judicial notice filed November 23, 2010. "RJN2" refers to the County Agencies' motion requesting judicial notice filed February 10, 2011. Citations are as follows: RJN#:vol:no:page(s).

attainment purposes. The Air District will not and cannot use the monitors for NAAQS compliance.

The Salton Sea monitoring network has been operational as of February 2010. In just one year, the monitors have already recorded sixteen elevated readings in excess of the health-based 24 hour PM_{10} standard.[9] These data confirm the analysis and conclusions in the county agencies' opposition to appellants' petition for writ of supersedeas, in particular the declarations of Ken Richmond (RJN2:1:1:1-60), Julia Lester (RJN2:1:2:61-63), Emanuel Sanchez (RJN2:3:4:364-416), and Michael Green (RJN2:3:5:417-420) showing that the QSA is currently contributing to serious air quality impacts at the Salton Sea. These impacts are due to in large part to the QSA and must be mitigated at the Salton Sea shoreline. It is the obligation and responsibility of appellants to mitigate the impacts their QSA has caused, and who have clearly not done so as reflected in the current PM_{10} concentrations recorded by the monitors at the Salton Sea. The impacts at the Salton Sea cannot be mitigated by the imposition of PM_{10} regulations in other areas of the Imperial Valley.

The environmental amici are correct to be concerned about the public health effects of fugitive dust from the Salton Sea. The public health effects of PM_{10} are explained in the declarations of Stephen Munday (RJN2:3:7:468-483), Jean Ospital (RJN2:4:9:608-614), and Brad Poiriez (RJN2:2:8:490-492), submitted to this Court by the county agencies as part of their opposition to appellants' petition for writ of supersedeas, and for which the county agencies filed an unopposed request for judicial notice

[9] The monitors' location and data appear at http://www.co.imperial.ca.us/AirPollution/Web%20Pages/SALTON%20SEA.htm

with their cross-appellant reply briefs. In addition to PM_{10} health effects, like Owens Lake, the Salton Sea's fugitive dust is also likely to contain toxics that pose a risk to public health. (See Air District RB/XAOB 103-104; Ted Schade declaration, RJN2:2:3:145-147; Julia Lester declaration, RJN2:1:2:70.)

2. Migratory Birds.

With the disappearance of other "migratory stepping stones," the Salton Sea serves for migratory birds as "one of the great oases of the West." (Audubon Brief 1-2 (citing W. DEBUYS AND J. MYERS, SALT DREAMS (2001) 227).) The Salton Sea ecosystem serves more than 400 bird species, such as the federally listed threatened western snowy plover, the state listed endangered desert pupfish, and others listed by California as fully protected or special status species. (Audubon Brief 2.) The environmental amici's concerns are consistent with those expressed by Jeffry Fisher in his declaration submitted with the county agencies' opposition to appellants' petition for writ of supersedeas and RJN: that the QSA causes a reduction in the Salton Sea's elevation, exposes nesting sites of ESA covered species on islets to ground predators, and eliminates these breeding areas earlier than expected under the EIR/EIS analysis. (RJN2:4:11:639, 643.)

3. Salton Sea Elevation.

As confirmed in data from the United States Geologic Survey and the Bureau of Reclamation, "[t]he surface elevation of the Salton Sea declined 3.1 feet between the signing of the QSA in October 2003 and the same date seven years later, in October 2010, exposing some 9,900 acres of

former lakebed." (Audubon Brief 5.) The PCL brief is correct that "[o]n the facts, it cannot be reasonably disputed that the Salton Sea's water levels and avian habitats have already suffered significant adverse impacts since the challenged QSA approvals in 2003." (PCL Brief 10.) The Colorado River Water Delivery Agreement ("CRWDA") shows (see table below) that elevation of the Salton Sea is declining because the QSA results in IID diverting less water for agricultural use, and the amount of mitigation water is insufficient to make up for the reduction in inflow, contrary to IID's assertion that the mitigation water is "bucket for bucket." (See also Air District RB/XAOB 117-122, 124-128; Air District XARB 73-75.)

Column G identifies the amount of inflow that no longer flows to the Salton Sea after the QSA and shows that the amount of mitigation water is insufficient to fully offset the reductions. (Vol-8:Tab-164:AR3:CD1:10285.[10])

A	B	C	D	E	F	G
Year	IID Cap (mafy)	IID Net Consumption (kafy) under QSA	Mitigation Water to the Salton Sea (kafy)	IID Inflow Assume[11] (kafy)	Total of Net Consumption and Sea Mitigation Water (C + E)	Shortfall Between Cap and Total under the QSA (kafy) (B – F)
2003	3.1	2,963.5	5	15	2,978.5	121.5
2004	3.1	2,948.5	10	30	2,978.5	121.5
2005	3.1	2,933.5	15	45	2,978.5	121.5
2006	3.1	2,909.5	20	60	2,969.5	130.5
2007	3.1	2,903.5	25	75	2,978.5	121.5
2008	3.1	2,811.6	25	75	2,886.6	213.4
2009	3.1	2,772.8	30	90	2,862.8	237.2
2010	3.1	2,733.8	35	105	2,838.8	261.2

[10] Citations to the ARs are: Vol-No.:Tab-No.:AR#:CD[file]:Page(s). The Vol. and Tab numbers refer to the county agencies' excerpts of ARs filed in this appeal. Volume 11 is filed concurrently with this brief.

4. Missing Monitoring Projects.

Despite that deteriorating condition, State agencies (Department of Fish and Game, "DFG" and Department of Water Resources, "DWR") have failed to implement "any habitat, air quality management, or biological monitoring projects at the Salton Sea," evading a consensus to implement "period 1" activities as "identified in the PEIR" and authorized in Fish and Game Code section 2932. (Audubon Brief 11.) The habitat conservation plan, which is a mitigation measure, has never been completed. The environmental amici confirm the concerns expressed in the declaration of Brad Poiriez submitted with the county agencies opposition to appellants' petition for writ of supersedeas about the lack of expenditures for air quality mitigation by the QSA-JPA. (RJN2:3:8:495-498.)

B. Under the QSA, time will quickly run out on the Salton Sea, irreversibly damaging the environment and public health.

Conspicuously missing from the State and water agencies' briefs is any sign that they are "even slightly concerned" about severe impacts to the Salton Sea following the cessation of mitigation water. (Audubon Brief 14.)

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[11] The county agencies assume for this purpose IID's assumption stated in John Eckhardt's declaration submitted with appellants' supersedeas petition (vol. 3, p. 253) that when water is conserved by fallowing, one third of the water that is applied to the agricultural fields flow to the Salton Sea, and therefore only one third of the water transferred needs to be sent to the Salton Sea. Therefore, the county agencies triple the amount of water sent to the Salton Sea to represent the inflow that would have occurred without the QSA before comparing IID's consumption to the 3.1 mafy cap. (Before the QSA, IID had ordered and received (since 1994) between 3.0 and 3.2 mafy of Colorado River water, Vol-11:Tab-245:AR3:CD31:70350-70351.) IID admits in the Eckhardt declaration that for on-farm conservation

As the Audubon brief confirms, deteriorating Salton Sea conditions since 2003 will become far worse after 2017, the termination year for IID's delivery of mitigation water to the Salton Sea.[12] For example:

(1) Following IID's cessation of mitigation water to the Salton Sea, "inflows to the Salton Sea will decrease precipitously," causing "a measurable degradation of water quality" and "the reduction in the surface elevation of the Salton Sea by as much as twenty feet in twelve years." (Audubon Brief 7 (citing Cohen and Hyun report).) Salinity in the Salton Sea will triple, and water quality changes will "*render the Sea uninhabitable for almost all of the organisms that currently rely upon it*, including several listed species of birds." (*Id.* (emphasis added).)

(2) Once IID curtails its mitigation water to the Salton Sea under the QSA, humans will be among the organisms facing grave consequences. "Tens of thousands of acres of lakebed will be exposed," allowing wind-borne dust particles to spread, and "impairing public health in downwind areas." (Audubon Brief 7.)

(3) Despite the State's 2003 QSA implementing legislation "to ensure the protection of the Salton Sea ecosystem as part of any water transfer," the State has followed that commitment with near-complete

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methods 100 percent of the water transferred would have to be sent to the Salton Sea to offset the amount water that would not flow to the Salton Sea.

[12] In their supersedeas petition (p. 24), the water agencies cited this agreement as the mechanism to prevent "the QSA's transfers from exposing shoreline playa or causing salinity increases." IID will terminate its commitment to provide mitigation water by 2018. See Vol-6:Tab-113:AR3:CD18:526917, 527007-527008; Vol-11:Tab-254:AR3:CD14: 400776.

inaction. (Audubon Brief 3 (discussing Fish & Game Code, § 2931(a) and Sen. Bill 654, Stats. 2003, ch. 613).) Neither the State nor the QSA parties has even "begun the planning process for long-term mitigation efforts." (Audubon Brief 4.)

(4) Under the QSA, a mitigation or restoration plan cannot become functional in time to forestall disastrous consequences for the Salton Sea ecosystem, and dangerous impacts to water quality, air quality and public health. (Audubon Brief 14.) Assuming *arguendo* this commitment were made and funded this year, State timelines suggest that "the earliest a functional mitigation project would be operational at the Salton Sea would be early in 2021, *more than three years after the QSA-scheduled delivery of mitigation water to the Sea ends and the Sea's rapid decline begins*." (*Id.* (emphasis added).)

As PCL's brief argues, this "backdrop of escalating environmental impacts and on-the-ground administrative incompetence" underscores the urgent need for this Court to promptly and fully address and remedy the environmental merits. (PCL Brief 21.)[13] Avoidance of the CEQA merits once more, or even remand of the merits review to the trial court, would risk dangerous delay, allowing the water agencies further opportunities to engage in "procedural games, while they aggressively move forward with their plans to bleed the sea dry." (*Id.* 23.)[14]

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[13] Here the "illegality and inadequacy" of the EIRs timely challenged in the cross-appeal must be "so obvious" that the appellants have provided this Court with no defense on the merits. PCL Brief 21-24 (providing as an example the final QSA project's complete reversal on the issue of land fallowing).

[14] The State and water agencies have repeatedly raised the prospect that certain mitigation costs might be avoided if the Salton Sea deteriorates to

II. THE ENVIRONMENTAL AMICI ILLUMINATE DEFICIENCIES IN APPELLANTS' ASSESSMENT OF SALTON SEA MITIGATION AND RESTORATION COSTS.

The briefs of environmental amici assist in exposing deficiencies in the appellants' analysis of mitigation and restoration costs. Mitigation commitments of IID, SDCWA and CVWD "would not have been made" without the State's QSA-JPA obligation to cover mitigation costs exceeding the water agencies' cap of $133 million in 2003 present value. (Vol-8:Tab-172:AR3:CD1:10457.)[15] The QSA-JPA also allocates to the State "remaining financial and other risks" of Salton Sea restoration costs exceeding the water agencies' $30 million. (Vol-8:Tab-172:AR3:CD1:10458.) The Audubon brief (7-8) supports respondents' contentions that restoration was a part of the QSA package and confirms the trial court's finding (AA:47:292:12750[16]) that the QSA would not have been executed without the unconditional commitment of the State.

The State's Salton Sea commitment cannot be fully understood without resolving the CEQA claims.[17] No court has addressed the merits of the county agencies' argument that restoration should have been studied as a feasible QSA mitigation measure. (County RB/XAOB 15-16; Air District RB/XAOB 131-132.) The IID directors' October 2, 2003 QSA approval

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the point in which mitigation becomes infeasible. See, e.g., IID AOB 43, SDCWA/CVWD/MWD AOB 58-59, State AOB 24; SDCWA/CVWD/MWD ARB 23; IID ARB 21.

[15] That commitment serves as the QSA's "principal mechanism" to ensure compliance with federal and state environmental law. Vol-8:Tab-172:AR3:CD1:10457.

[16] Citations to appellants' appendix are as follows: AA:vol.:tab:page(s).

[17] The "environmental mitigation requirements" draw their definition from the same "environmental review process" challenged in the cross-appeal.

likely arose out of a version of the QSA-JPA in which mitigation *includes* restoration (assuming the John Carter declaration is accurate). (County RB/XAOB 16 (citing RJN1:10:159 (¶1.1(c)); Air District RB/XAOB § IV.5.C.4).)

The Audubon brief confirms a relationship between mitigation and restoration that belies IID's argument that restoration is an "entirely different obligation" found in the QSA-JPA. (IID ARB 16.) Audubon California and its co-amici declined to challenge the QSA in 2003 only because of the "State's commitment to develop and implement a Salton Sea Restoration Plan" during the 15-year period from 2003 in which IID provides mitigation water to the Salton Sea. (Audubon Brief 7.)

Implementation of the 2003 provision defining the State's restoration duties (SB 277 (Stats. 2003, ch. 611)) was expressly linked with, and required implementation of, SB 654, the State legislation describing "the State's assumption of financial responsibility for mitigation of QSA-related impacts to the Salton Sea." (Audubon Brief 8 (citing Fish & Game Code, § 2931(a), SB 277, and SB 654).)

IID posits that restoration measures the State may enact during the 15-year window could have a "potentially enormous" ability to reduce QSA mitigation costs. (IID ARB 16.) That argument cannot survive Audubon's analysis (section I.B, *supra*) demonstrating the impossibility of implementing a plan before the QSA "doomsday clock" counts down to zero and jeopardizes the environment.

County XARB 8, citing Vol-9:Tab-209:AR3:CD14:400290 (SB 654 (Stats.

Ironically, the IID board's Salton Sea Resolution (No. 3-2011, http://www.iid.com/Modules/ShowDocument.aspx?documentid=4486) partly rebuts IID's own appellate argument, which optimistically suggests that restoration will soon be implemented. (IID ARB 16.) In its February 1, 2011 resolution, the Board underscores, as amici do here, that the State's pending restoration plan remains entirely unfunded, and is entirely unlikely to reduce QSA mitigation responsibilities.[18]

Even if "mitigation" is construed to exclude the broader costs of restoration, the Audubon brief confirms the State's own recognition that anticipated costs of implementing QSA mitigation measures will far exceed the water agencies' cap of $133 million in 2003 present value. The State's May 2007 report, Salton Sea Ecosystem Preferred Alternative Report and Funding Plan ("Preferred Analysis Report") "estimated the cost of mitigating the air quality and related impacts of the QSA waster transfers" at $801 million, with annual operations and maintenance costs of an additional $49 million. (Audubon Brief 4 (measuring these figures uniformly in 2006 dollars).)[19]

Subtracting $146 million committed by the water agencies ($133 million in 2003 present value adjusted to 2006 dollars) yields the conclusion that if the State's own figures are accurate, the State "will be

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2003, ch. 613), § 3(d).

[18] Resolution No. 3-2011 criticizes the State's 2007 "preferred resolution alternative," projected to cost almost $9 billion, as unrealistic, unachievable and unsupported by a funding plan. IID argues that the State's approach to restoration could affect the "continued viability" of the 2003 QSA.

[19] The State's Preferred Analysis Report included these figures in its assessment of the no action alternative, which included "implementation of mitigation measures for the QSA and Imperial Irrigation District Water Conservation and Transfer Project." Audubon Brief 9.

liable" for $655 million in capital costs exceeding the water agencies' capped contributions, plus $49 million in annual operations, all measured in 2006 dollars. (Audubon Brief 9.)[20] The environmental amici briefs confirm the cost analysis in the declaration of Ted Schade submitted with the county agencies' opposition to appellants' petition for writ of supersedeas and unopposed request for judicial notice. (RJN2:2:3:143-144.)

III. THE ENVIRONMENTAL AMICI CONFIRM THIS COURT'S AUTHORITY AND DUTY TO ADJUDICATE THE MERITS OF THE WATER AGENCIES' CEQA COMPLIANCE.

The PCL brief thoroughly discredits cross-respondents' assumption that this Court needs and lacks a separate source of "original jurisdiction" to adjudicate CEQA merits that arise in a timely cross-appeal. As PCL concludes, that argument is not simply wrong, but contrary to *Vineyard Area Citizens for Responsible Growth v. City of Rancho Cordova* (2007) 40 Cal.4th 412, 421, which describes de novo review in a CEQA action.

The water agencies claim a jurisdictional defect in the present circumstance where (1) the CEQA issues were fully briefed on the merits by all sides in the trial court; (2) the county agencies, among others, fully briefed the CEQA merits on appeal; and (3) the State and water agencies had a clear opportunity to brief the merits on appeal, but passed up their

[20]The standard source used in the Audubon brief to calculate consistent relative values (Audubon Brief 9) also reveals as grossly exaggerated the water agencies' use of $387 million as the current value of $133 million in 2003 dollars. Cf. IID RB 28. Using either the CPI or GDP deflator, $133 million in 2003 dollars was worth $146 million in 2006 and $155 million in 2010. See http://www.measuringworth.com/uscompare/, last visited March 22, 2011.

opportunity to do so. Nonetheless, the water agencies argue that this Court lacks any power to address the CEQA merits as part of the cross-appeal.

The water agencies rely heavily on dissimilar cases, in which court opted to have the trial court resolve distinct fact-specific discrepancies. First, citing *Uriarte v. United States Pipe and Foundry Co.* (1996) 51 Cal.App.4th 780, 791, they argue that "[f]undamentally, unlike trial, the purpose of an appeal is not to determine the case on its merits, but to review for trial court error." (SDCWA/CVWD/MWD ARB 191.) *Uriarte* addressed appeal of an order granting relief from *summary judgment* based upon *newly discovered factual evidence* in a personal injury action.[21]

Second, the water agencies cited *Koster v. County of San Joaquin* (1996) 47 Cal.App.4th 29, 44-45, suggesting the unaddressed CEQA merits should be resolved first by the trial court. (SDCWA/CVWD/MWD ARB 191.) In *Koster*, the appellate court reversed a trial court determination that a CEQA claim was premature and need not be addressed on the merits. But underlying its decision to remand the CEQA merits lurked a major *factual* deficiency; the parties had not provided the appellate court with the 41,000-page administrative record. (*Id.* at 45.)

Cases such as *Uriarte* and *Koster* cannot overcome the PCL brief's analysis of CEQA de novo review in *Vineyard*. Those cases were the same decisions relied upon in the *depublished* appellate ruling in *Vineyard*.[22] The

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[21] *Uriarte* held that "whether summary judgment is appropriate *in light of a significant new factual development*" is an issue that should first be presented to the trial court. 51 Cal.App.4th at 791 (emphasis added).

[22] The depublished *Vineyard* ruling quoted *Uriarte* in perhaps its most famous line: that *de novo* review "does not mean the trial court is a potted plant in that process." *Uriarte*, 51 Cal.App.4th at p. 791; see also

Court granted review in part on the question of whether the appellate ruling improperly focused on the "trial court's ruling" rather than on whether the "record supported respondents' approval" of the EIR. (PCL Brief 14.) Resolving this CEQA issue, *Vineyard* held that appellate review of the administrative record for legal error and substantial evidence in a CEQA case operates the same way as in the trial court: "*the appellate court reviews the agency's action, not the trial court's decision*; in that sense appellate judicial review under CEQA is de novo." (*Vineyard*, 40 Cal.4th at p. 427 (emphasis added).)

Vineyard's description of de novo review correctly applies earlier CEQA cases establishing that in both trial and appellate courts, the "identical" task involved is to review the administrative record, and trial court findings are "not dispositive." (*Sierra Club v. County of Sonoma* (1992) 6 Cal.App.4th 1307, 1321; see also *County of Amador v. El Dorado County Water Agency* (1999) 76 Cal.App.4th 931, 946.) Courts must, however, "scrupulously enforce all legislatively mandated CEQA requirements." (*Id.* at pp. 946, 947.) This includes the rule that when a court identifies noncompliance with CEQA, it must "specifically address each of the alleged grounds for noncompliance." (Pub. Res. Code, § 21005; see also PCL Brief 15.)

Here the Court has the full administrative record, as well as full briefing of the CEQA merits in actions first filed more than seven years

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http://caselaw.findlaw.com/ca-court-of-appeal/1258506.html (depublished *Vineyard* ruling); cf. E. Magnuson, *et al.*, *Not Yet a Potted Plant*, TIME (Aug. 10, 1987) (during Iran-Contra hearings, Oliver North's attorney Brendan Sullivan rebuffed suggestion that his client speak for himself by asserting, "I am not a potted plant").

ago. As the PCL brief cogently argues, further delay to allow the trial court to apply the identical standard to the same record would serve no lawful purpose. It would, however, allow the water agencies the opportunity to insulate the country's largest water transfer from any meaningful accountability under CEQA. (PCL Brief 19.) This Court can, and must, "review and decide the merits" on appeal. (*Id.*)

The PCL brief also reinforces the county agencies' detailed analysis showing that the CEQA merits claims are not moot. As the brief observes, because the EIR certifications remaining in place are "separate and distinct" final actions and decisions that are "not affected by simply setting aside the administrative approvals." (PCL Brief 17.) Without resolving their status, the water agencies and others will conclusively presume the legal adequacy of CEQA documents that have never reached, must less survived, judicial scrutiny. (*Id.* 19.)[23] PCL adds to the discussion by highlighting the ominous precedent that would result from a decision that an agency's timely EIR challenge can be dismissed as "moot" based upon setting aside the agency's approvals on non-CEQA grounds. That result could "forever shield" defective CEQA documents from judicial scrutiny because courts would dismiss the "original, timely challenge" without merits resolution, while allowing agencies to assert a "conclusive presumption" in later proceedings that CEQA compliance has been met. (*Id.*)[24]

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[23] As suggested by those "ominous" consequences, this proceeding does not present a circumstance where a court ruling would have "no practical effect" or "cannot provide the parties with effective relief." *People v. Rish* (2008) 163 Cal.App.4th 1370.

[24] A new federal decision, *California Wilderness Coalition v. U.S. Department of Energy* (9th Cir. 2011) 631 F. 3d 1072, also supports prompt adjudication of the environmental claims at this time. The Ninth Circuit vacated a congestion study for a national interest electric transmission corridor ("NIET"), due to DOE's failure to consult as required in section

IV. THE ENVIRONMENTAL AMICI CONFIRM THAT THE COURT'S PRECEDENTS ENABLE AN EFFECTIVE REMEDY TO HALT HARMFUL QSA OPERATIONS.

The PCL brief observes that as QSA implementation "ratchets up" without promised environmental protection, the fate of the Salton Sea and the populations it supports "hangs precariously in the balance," requiring "this Court's prompt, decisive, and direct corrective action to protect the public health of the residents and the unique and irreplaceable biological values of the Salton Sea and surrounding region." (PCL Brief 20.)

Amici concur with the county agencies that, as in two earlier cases in which this Court has installed judicial remedies to reverse a destructive misuse of water resources, potent judicial intervention is needed to ensure that the water agencies will "live up to their environmental stewardship obligations and duties." (PCL Brief 24.)[25] The environmental amici correctly recognize that the on-going destruction of the Salton Sea's ecological systems and impacts to public health make it imperative that this Court, rather than remand the issue, determine relief as part of its appellate review.

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216 of the Federal Power Act ("FPA"). But the court went on to vacate the NIET corridor on a further ground, that DOE had not conducted environmental review complying with NEPA. *Id.* at [*56]. The court noted that even if the FPA holding had not been reached, the NEIT would still need to be vacated for failing to consider environmental consequences. The court specifically concluded that, "because DOE will now have to prepare new NEITs based on a new Congestion Study, our guidance on this [NEPA] issue shall be useful for all concerned." *Id.*

[25] *County of Inyo v. City of Los Angeles* (1984) 160 Cal.App.3d 1178, 1186-1187; *California Trout, Inc. v. Superior Court* (1990) 218 Cal.App.3d 187. For reasons discussed above, here these cases are referenced for their discussion of remedies. The Court's original jurisdiction need not be invoked, because the merits may be addressed in the context of the cross-appeal.

The water agencies, fixated on the desire to retain an unmitigated QSA, never directly addressed the county agencies' efforts to craft a remedy that would allow the transfers to continue while the EIR/EIS defects and federal Clean Air Act ("CAA") noncompliance are cured, provided that the Salton Sea's levels not be allowed to decline lower than -230.5 mean sea level ("msl"). If the water agencies are unwilling to protect the environment and public health while they come into compliance with environmental laws, the county agencies have no choice but to ask this Court to enjoin the water transfers unconditionally.

CONCLUSION

Clearly the QSA is not "too big to fail," because it already has failed to assure funding of the mitigation necessary to fulfill the water agencies' obligations to protect public health and the environment. To overcome this failure will require a stay of QSA operations that cause the Salton Sea's levels to decline lower than -230.5 msl, as discussed in the county agencies' supersedeas response to the water agencies (63-65) and County RB/XAOB 131-132; setting aside of the QSA's environmental certifications and approvals; and direction to the water agencies to proceed, if at all, only after full compliance with environmental laws, including CEQA, Water Code section 1018, and the CAA (County RB/XAOB 131-132 (detailing specific remedies for each breach).) The "public health of the residents of the Salton Sea region and the Sea's precious and irreplaceable biological resources deserve no less." (PCL Brief 24.)

Dated: 1 April 2011

Respectfully submitted,

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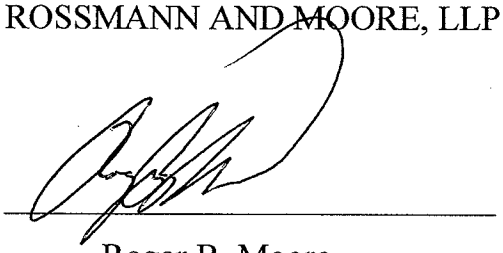
BRIEF FORMAT CERTIFICATION

I hereby certify that the attached BRIEF OF COUNTY OF IMPERIAL AND IMPERIAL COUNTY AIR POLLUTION CONTROL DISTRICT IN RESPONSE TO AMICI CURIAE AUDUBON CALIFORNIA, DEFENDERS OF WILDLIFE, PACIFIC INSTITUTE, PLANNING AND CONSERVATION LEAGUE AND ENVIRONMENT NOW is in 13-point type and contains 5,894 words, including footnotes .

Dated: April 1, 2011

Respectfully submitted,

ROSSMANN AND MOORE, LLP



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